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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEVE BYRD, Defendant and Appellant.	C036033 (Super. Ct. No. 98F02258)

APPEAL from a judgment of the Superior Court of Sacramento County. Talmadge R. Jones, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, John G. McLean, Supervising Deputy Attorney General, Mary Jo Graves, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II and III of the DISCUSSION.

In this case arising under the Three Strikes Law, defendant Steve Byrd appeals from a judgment following his conviction for 12 counts of robbery (Pen. Code, § 211[1]), one count of mayhem (§ 203), one count of attempted premeditated murder (§§ 664/187, subd. (a)), and one count of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)), with enhancements for personal use of a firearm (§ 12022.53, subd. (b)), personal discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)), and three serious felony prior convictions (§§ 667, subd. (a); 667, subd. (b)-(i)).

Defendant was sentenced to state prison for a determinate term of 115 years, plus an indeterminate term of 444 years to life.

On appeal, defendant raises claims of evidentiary and sentencing error, and prosecutorial misconduct in closing argument. In the published portion of the opinion, we reject defendant's contentions that the trial court erred in calculating his sentence and that his sentence constitutes cruel and/or unusual punishment. In the unpublished portion of the opinion, we reject defendant's other contentions of prejudicial error. We shall therefore affirm the judgment.

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[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged as follows:

Counts 1 through 12 – robbery (§ 211) of various fast-food restaurants between February 17, 1998, and March 2, 1998;

Count 13 – mayhem (§ 203) on March 2, 1998, by depriving Antonio G. of a member of his body, to wit, kidney, liver, pancreas and gallbladder, and scarring his torso, thereby disabling, disfiguring and rendering the above parts of the body useless;

Count 14 – attempted murder (§§ 664/187) of Antonio G. on March 2, 1998;

Count 15 – possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)), based on a 1984 robbery conviction.

The information also alleged defendant personally used a firearm in the commission of counts 1 through 14 (§ 12022.53, subd. (b)); personally discharged a firearm causing great bodily injury to Antonio G. in counts 11 through 14 (§ 12022.53, subd. (d)); and had three serious felony prior convictions (§ 667, subd. (a); § 667, subds. (b)-(i)) for robberies in Los Angeles in 1980, 1984, and 1990.

The evidence adduced at trial showed that between February 17 and March 2, 1998, numerous armed robberies were committed at fast-food restaurants in Sacramento. The suspect in each crime was an African-American man, armed with a revolver. In the last robbery, a Spanish-speaking employee was shot in the abdomen when he did not respond to the assailant’s demand for money. The victim underwent emergency surgery for the gunshot wound,

which injured his liver, stomach, pancreas and intestines. A kidney, which was irreparably damaged by the gunshot, was removed during surgery.

Defendant was arrested on March 11, 1998. He had in his possession a newspaper article about the robberies. His palm print was found on the counter of one of the fast-food restaurants. He was positively identified by witnesses in each of the crimes.

Defendant testified at trial, against the advice of his trial attorney.[2] He denied committing any of the offenses which are the subject of this prosecution. He admitted that, at the time of his arrest, he was in possession of a newspaper article about the crimes, which he said was given to him by a friend. He admitted he had prior theft-related convictions in 1980, 1984, and 1990 (admitted at trial for the limited purpose of impeachment). He admitted he wrote, in a letter from jail to a friend, "God, I wish I would have never come out here. Yes, I was on the news and in the newspaper. That's why I'm going to get my case out of Sacramento." During cross-examination, defendant replied "I guess" or "If you say so" to most of the prosecutor's questions, and said to the prosecutor, "Why don't

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[2] At the hearing on his motion for a new trial, defendant said he took the witness stand at trial because "I just wanted to let the jury know how much time I was facing." In denying the motion for new trial, the court noted it was clear defendant took the stand at trial not to put on a defense but to try to obtain jury nullification by bringing into the trial issues of penalty.

you just go ahead and give me the 400 years you want to give me." When defendant repeated the comment, the trial court interjected: "The jury will ignore any statements made about the sentencing issues. . . . I do not want the jury to speculate about any sentencing. If, and there's a big if, you find the defendant guilty, ignore any statements made about sentencing. That's for the Judge, not for the jury, not for [defendant]; that's for me. Disregard any statements about sentencing."

The jury found defendant guilty on all counts and found true all enhancement allegations under section 12022.53.

Defendant waived jury trial on the prior conviction allegations, and the trial court found them to be true.

The trial court denied defendant's motion for a new trial and motion to strike the prior convictions.

The trial court sentenced defendant to state prison for a determinate term of 115 years, plus an indeterminate term of 444 year to life, as follows:

Determinate Sentence:

- Ten consecutive terms of 10 years for the firearm use enhancements (§ 12022.53, subd. (b)) in counts 1 through 10 (robberies);[3]

- Five-year terms for each of the three serious felony prior convictions (§ 667, subd. (a)).

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[3] The court stated "Consecutive sentencing is being ordered under the determinate sentencing law for the first ten counts due to the separate acts of violence in each case."

Indeterminate Sentence:

- Fully consecutive terms of 30 years to life for the robberies in counts 1 through 10 (§ 667, subd. (e)(2)(A)(iii));[4]

- A consecutive term of 70 years to life for the robbery in count 11 (§ 667, subd. (e)(2)(A)(iii));[5]

- A consecutive term of 74 years to life for attempted murder in count 14 (§ 667, subd. (e)(2)(A)(iii)).[6]

Pursuant to section 654, the trial court stayed terms of 70 years to life for count 12 (robbery), 73 years to life for count 13 (mayhem), and 25 years to life for count 15 (felon in possession of firearm).

DISCUSSION

I. Admission Of Evidence

Defendant argues the trial court erred by admitting into evidence the newspaper article found in his possession at the

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[4] The terms in each of counts 1 through 10 were calculated pursuant to section 667, subdivision (e)(2)(A)(iii) as follows: The aggravated term of five years for robbery, plus ten years for personal use of a firearm under section 12022.53, subdivision (b), plus 15 years for the prior convictions under section 667, subdivision (a).

[5] The term in count 11 was calculated as follows: The aggravated term of five years for the robbery, plus 25 years under section 12022.53, subdivision (d), for personal discharge of a firearm causing great bodily injury, plus 15 years under section 667, subdivision (a), plus 25 years to life for the firearm use enhancement (§ 12022.53, subd. (d)).

[6] The term in count 14 was calculated as follows: The aggravated term of nine years for attempted murder, plus two 25-year enhancements (§ 12022.53, subd. (d)), plus 15 years (§ 667, subd. (a)).

time of his arrest and a letter he wrote to his girlfriend while he was in custody. We disagree.

Before trial, the prosecutor sought a ruling on admissibility of the March 4, 1998, newspaper article found in defendant's possession when he was arrested on March 11, 1998. The article described the fast-food robberies and included a photograph taken from a surveillance videotape at one of the fast-food outlets. The court ruled the article was admissible as circumstantial evidence of implied admission or adoptive admission. The clipping was redacted, so that only the date, caption of the article ("Shooting Intensifies Theft Probe") and the photograph taken from the surveillance videotape were admitted into evidence.

Before defendant's testimony, the trial court ruled the prosecutor would be permitted to use for impeachment purposes a letter defendant wrote to his girlfriend while in custody, stating in part "God, I wish I would have never come out here. Yes, I was on the news and in the newspaper. That's why I'm going to get my case out of Sacramento." The letter was dated October 31, 1999. The trial court and prosecutor assumed the letter referred to the March 4, 1998, newspaper article found in defendant's possession when he was arrested on March 11, 1998. The defense did not dispute this assumption but merely argued the letter should only come in if it was an admission, and it was not an admission, it was merely a defendant acting in propria persona talking about a change of venue for his trial because of media coverage. The court concluded the letter was

relevant for impeachment purposes and, while there was some prejudice, the probative value outweighed the prejudice.

The jury was told the letter stated in part: "God, I wish I would have never come out here. Yes, I was on the news and in the newspaper. That's why I'm going to get my case out of Sacramento." When defendant was asked on cross-examination what newspaper article he was referring to in the letter, he said "I don't know."

The prosecutor argued to the jury that defendant's letter referred to the newspaper article found in his possession when he was arrested - an article which described the suspect before he was identified.

On appeal, the People concede the newspaper article was not admissible as an implied or adoptive admission, but they argue it was nevertheless highly relevant and therefore properly admitted, and a ruling correct in law will not be disturbed on appeal merely because it was made for the wrong reason. We agree with the People.

Except as otherwise provided, all relevant evidence is admissible. (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 351.) Defendant has the burden of showing the admitted evidence should have been excluded. (Evid. Code, § 353.) He fails to meet his burden.

The fact defendant carried the week-old clipping demonstrated a special interest in the crimes and supported an inference that defendant had a link with the subject of the clipping. Moreover, the same bag which contained the clipping

also contained clothing consistent with the clothing described by the robbery victims. The clipping was redacted and not offered for the truth of its content, but rather for the nonhearsay purpose of defendant's possession of it.

Defendant fails to show any basis for reversal with respect to the newspaper clipping.

With regard to the letter, defendant argues his reference to being in the news was not an admission of guilt, but an expression of concern that he would not get a fair trial because of pretrial publicity. However, defendant's desire for a change of venue does not negate the prosecution's theory that he was referring to the newspaper article found in his possession when he was arrested, an article which did not identify him by name and which was published a week before his arrest. Defendant was free to argue opposing inferences to be drawn from the letter. Yet, when given the opportunity at trial, he said he did not know what newspaper article he was referring to in his letter.

Defendant argues that, in the alternative, the letter should have been excluded under Evidence Code section 352 as unduly confusing and prejudicial, because the jury was likely to be misled by defendant's reference to media coverage, confusing his desire for an unbiased jury with implied admissions of guilt. We disagree. A trial court's exercise of discretion under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v.*

Rodriguez (1999) 20 Cal.4th 1, 9-10.) We perceive no such abuse of discretion on this record.

Defendant fails to show grounds for reversal of the judgment based on erroneous admission of evidence.

II. Exclusion Of Evidence

Defendant contends the trial court erred by excluding evidence of third party culpability. We disagree.

In connection with presentation of the defense case, the defense, outside the presence of the jury, sought admissibility of evidence which assertedly bore on the issue of third party culpability. The defense submitted a December 4, 1999, Sacramento Bee newspaper article showing a photograph of what looked like an African-American male with a beard and black ski cap or beanie, who was alleged to have committed four armed robberies in late 1999 (when defendant was apparently in custody). The defense argued "there are a series of robberies that go on with individuals who might have similar descriptions all the time, and especially . . . African-American males with beanie caps and beards as similar to this one. [¶] It could be inferred possibly that the individual could be still out there . . . ."

The prosecutor objected, noting defendant had failed to show relevance, and the evidence should in any event be excluded under Evidence Code section 352, because the People would then have to call all witnesses and officers involved in a totally separate, independent criminal investigation.

The trial court noted the modus operandi of the 1999 robber was different, because "He didn't do fast food. He did pharmacies or other locations in Sacramento that had nothing to do with fast food, and we get into that whole 352 problem where the time consumed in rebutting the evidence or inference that you've raised unduly consumes time to no legitimate end . . . ."

The trial court invited counsel to respond to the court's comments, but defense counsel declined and submitted the matter. (RT 538) The court excluded the evidence.

We see no prejudicial error.

In order to be admissible, evidence of third party culpability must be direct or circumstantial evidence linking the third person to the actual perpetration of the crimes for which the defendant is being prosecuted. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) Third party culpability evidence is subject to Evidence Code section 352 analysis. (*Id*. at p. 834.)

On appeal, defendant fails to confront the distinguishing feature noted by the trial court, that the offenses charged against defendant all involved fast-food restaurants, whereas the 1999 robberies were not of fast-food restaurants.

Defendant argues Evidence Code section 352 did not justify exclusion of his proffered evidence, because the probative value of his evidence was not "substantially outweighed" by its potential for prejudice, confusion or undue consumption of time, in that the prosecutor would not have been required to call *all* witnesses to the uncharged robberies. We disagree with defendant's conclusion. The probative value was minimal or

nonexistent, in light of the distinctive modus operandi and the totality of other evidence against defendant. The potential for confusion and undue consumption of time was obvious.

We conclude defendant fails to show any error in the trial court's exclusion of evidence of third party culpability under Evidence Code section 352.

Moreover, even assuming the trial court erred in excluding the evidence, any error was harmless. The evidence against defendant was overwhelming, including eyewitness identifications of defendant not only at trial but at pretrial lineups shortly after the robberies; defendant's palm print at the scene of one robbery; defendant's possession of a week-old newspaper clipping about the robberies; and his comment to a friend that he was in the news.

Defendant argues his fingerprints were found at "only one" robbery scene, and he cites case law for the proposition that eyewitness identification is "proverbially untrustworthy" evidence entitled to "little weight." However, the cited authorities do not assist defendant. *United States v. Wade* (1967) 388 U.S. 218, 228 [18 L.Ed.2d 1149, 1158], held defendants are entitled to the presence of counsel during a pretrial lineup, to be vigilant against suggestiveness in the process. *People v. Cardenas* (1982) 31 Cal.3d 897, 907-908, in the course of concluding there was prejudice from evidentiary error, said the "only" incriminating evidence was the eyewitness identifications. (*Ibid*.) *People v. Palmer* (1984) 154 Cal.App.3d 79, also addressed a situation where the "only"

evidence against the defendant was the eyewitness testimony. (*Id*. at pp. 86, 88.)

Here, eyewitness testimony is not the only evidence against defendant. Moreover, in this case, defendant was positively identified by 10 separate witnesses. In these circumstances, the eyewitness identifications are entitled to great weight.

Any error in excluding the newspaper article was harmless, because it is not reasonably probable that defendant would have obtained a more favorable result had the evidence been admitted. (*People v. Cudjo* (1993) 6 Cal.4th 585, 610-612.)

III. Prosecutor's Argument To Jury

Defendant argues the prosecutor committed prejudicial misconduct during closing argument to the jury. We shall conclude defendant fails to show any grounds for reversal.

Defendant did not object to any of the prosecutor's statements during argument to the jury, and defendant has therefore waived this matter unless he can show a timely objection and admonition by the trial court would not have cured any harm. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Green* (1980) 27 Cal.3d 1, 34, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) He fails to meet this burden on appeal.

Defendant complains it was misconduct for the prosecutor to comment on defendant's future dangerousness by the following comments during argument to the jury:

"What do we know about Steve Byrd? We know that he's a very big danger to us, violent and even callous man. Just ask Antonio G."

"The only poison you heard about in this case is the evil fluid that was flowing through [defendant's] veins when he fired the shot at Antonio G."[7]

"If [the robbery victims] didn't do what [defendant] said, he was going to shoot them. He was going to kill them. And we know that because that's exactly what he did at Del Taco. That shows you his intent."

Assuming for the sake of argument that any of these remarks were improper, a timely objection would have cured any harm. Defendant therefore waived the matter by failing to object in the trial court.

Defendant next claims the prosecutor improperly attempted to shift the burden of proof to defendant by the following comments during closing argument:

"Anyone can say I'm not guilty, I didn't do it. Backing it up is another thing." (Here the trial court admonished the jury sua sponte: "With respect to that last statement, please remember that the defendant doesn't have to prove anything. It's the prosecution's burden of proof"; to which the prosecutor added "True.")

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[7] The reference to poison responded to defense counsel's argument that the witness identifications of defendant had been poisoned by the process used in the photo lineup procedure.

The prosecutor in closing argument read to the jury defendant's letter to his girlfriend stating he was on the news and in the newspaper, and then the prosecutor said "Explain that, Mr. Byrd. You're admitting this is you."

The prosecutor in closing argument to the jury commented on defendant's trial testimony:

"Mr. Byrd, can we be assured that when [defense counsel] has another opportunity to ask you questions you will convey to the jury facts that indicate you didn't commit these crimes?

"Yes, I'll do that.

"Did we hear anything like that? No. So they don't have a burden to prove anything. But when you take the stand and you do present evidence and witnesses, you better come up with something. He had two years to think of a defense. Even a bogus one. But you got zero. There is no defense.

"If he didn't commit these crimes, he would have told you what he was doing. Anyone in their right mind accused of these crimes will get up there and tell you I was somewhere else, I was with John my friend. He's going to come in and testify. I was doing this. I have this alibi. You heard nothing. And it's just further evidence of his guilt."

We agree with the People that, viewing the allegedly improper remarks in the context of the closing argument as a whole (*People v. Lucas* (1995) 12 Cal.4th 415, 475), the prosecutor's comments referred to the fact that defendant did not back up the claim he made on direct examination that he was not guilty. "A distinction clearly exists between the

permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

A sample of defendant's cross-examination testimony shows the prosecutor's argument to the jury was fair comment:

"Q [prosecutor] And do you recall Joseph S. from the Round Table Pizza coming in here and pointing at you and saying, You are the one that stuck the gun in my face and robbed Round Table?

"A. If you say so.

"Q. And he's right?

"A. I guess.

"Q. And do you recall Tammy T. from the KFC restaurant coming in here and saying that you robbed her two days in a row?

"A. I guess.

"Q. And she's right, too, isn't she?

"A. If you say so.

"Q. . . . You came back to the KFC and called her by her name, didn't you?

"A. If you say so.

"Q. And you called her a fucking bitch, didn't you?

"A. If you say so.

"Q. And you were pointing the gun right at Carl W. there the second day, weren't you?

"A. If you say so."

Defendant gave similar replies to the prosecutor's other questions about the crimes. Thus, the closing argument was fair comment. Moreover, the trial court gave the jury the standard instructions on burden of proof and reminded the jury of the burden of proof during closing argument. We see no possibility that the jury would have reached a different conclusion absent the prosecutor's remarks. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, 821.)

Defendant next contends the prosecutor misstated the law by telling the jury, in the course of stating it was not the jury's job to decide penalty or punishment, "The judge can take into account all sorts of things. Background. Periods of life in which, for example, he led a church group or whatever. Those are items for the judge to consider. He can strike prior convictions. He can do all sorts of things within his discretion." Defendant claims the prosecutor thus deceived the jury into believing the judge could ameliorate defendant's punishment following their guilty verdicts. We disagree.

Defendant implicitly acknowledges there was no deceit in his appellate brief, where he recognizes a trial court may strike prior conviction allegations under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 (though in his reply brief defendant says section 1385, subdivision (b), would prevent the trial court from striking prior convictions charged under section 667, subdivision (a)).

Moreover, the prosecutor's remarks were made in the context of reminding the jury not to consider penalty, in response to

defendant's attempt at jury nullification by apprising the jury of the severity of the sentence he faced. That prosecutors are held to an elevated standard of conduct, as asserted by defendant, does not render the comment improper. In any event, to the extent the prosecutor's comment could be viewed as improper, defendant's contention is waived, because a timely objection and admonition would have cured any harm. Indeed, the trial court told the jurors, during defendant's testimony and during jury instruction, not to consider any aspect of penalty. We see no basis for reversal.

Finally, defendant claims the prosecutor improperly expressed personal belief in defendant's guilt by telling the jury: "Everyone in this courtroom knows that Mr. Byrd committed these crimes, including Mr. Byrd. And we know that because of the manner in which he testified."

The prosecutor's comment was not an improper expression of personal belief. A prosecutor's expressions of belief in the defendant's guilt are not improper if the prosecutor makes clear that the belief is based on the evidence before the jury. (*People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.) Here, the prosecutor tied his belief to the evidence and did not suggest his belief was based on information outside the trial record.

Defendant fails to show any grounds for reversal of the judgment based on prosecutorial misconduct.

IV. The Trial Court Correctly Computed Defendant's Sentence on Counts 2 Through 10

Defendant contends the trial court erroneously computed his sentence on counts 2 through 10. We shall ultimately reject this contention. However, we shall first explain what the trial court did.

The trial court sentenced on counts 2 through 10 by applying section 667, subdivision (e)(2)(A)(iii), which provides as follows:[8] "(e) For purposes of subdivisions (b) to (i) inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: . . . [¶] (2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: . . . [¶] (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046."

For each count, the trial court calculated a minimum term of an indeterminate sentence, pursuant to section 1170, as

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[8] Substantially identical language is found in section 1170.12, subdivision (c)(2)(A)(iii).

follows: The aggravated term of five years for robbery (§ 213, subd. (a)(2)), plus ten years for personal use of a firearm under section 12022.53, subdivision (b), plus five years each (total of 15 years) for defendant's three prior serious felony convictions under section 667, subdivision (a). The minimum term of the indeterminate sentence on each count was therefore 30 years.

The trial court then ran each of these terms fully consecutive pursuant to section 667, subdivision (e)(2)(B), which provides in relevant part:[9] "The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law." This language requires that full-term consecutive sentences be imposed. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 394, disapproved on another point in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.)

Defendant contends the sentence imposed on counts 2 through 10 is erroneous in two respects.

First, he argues that the trial court incorrectly computed the minimum term of the indeterminate term for each count. He notes that, for each count in counts 2 through 10, the trial court added a total of 15 years for his three prior-serious-felony-conviction enhancements. (§ 667, subd. (a).) Citing *People v. Tassel* (1984) 36 Cal.3d 77, at page 90, defendant

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[9] Substantially identical language is found in section 1170.12, subdivision (c)(2)(B).

argues that his prior serious felony convictions are status enhancements that may be used only once where consecutive sentences are imposed. Defendant says that since the serious felony enhancements were used to compute his sentence on count 1, they may not be used again in counts 2 through 10.

We do not agree with this argument. *People v. Tassel, supra,* reached its conclusion by relying on section 1170.1, subdivision (a), concerning consecutive sentencing. Thus, *Tassel* said, "[s]ection 1170.1, subdivision (a) starts out by stating the basic rule that when a person is convicted of two or more felonies, the total sentence consists of (1) the principal term, (2) the subordinate term, and (3) any enhancements for prior convictions. In so doing, it makes it very clear that enhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence." (*People v. Tassel, supra,* 36 Cal.3d at p. 90, fn. omitted.)

Tassell is inapposite because it relies on section 1170.1, and section 1170.1 does not apply to the sentencing of defendant, who has at least two prior strikes. Thus, where a defendant with at least two strikes is sentenced for multiple offenses, the minimum term for each indeterminate life term (under section 667, subdivision (e)(2)(A)(iii)) is calculated separately for each new offense, without regard to the other new offenses. (*People v. Nguyen* (1999) 21 Cal.4th 197, 205; *People v. Ayon, supra,* 46 Cal.App.4th at p. 392; see *People v. Thomas* (1997) 56 Cal.App.4th 396, 400, and authorities cited therein.)

"The consecutive sentencing provisions of section 1170.1 simply have no relevance in this context." (*People v. Nguyen, supra,* 21 Cal.4th at p. 206.) Therefore, in computing the minimum term for each determinate term on counts 2 through 10, the trial court correctly included, on each term, a total of 15 years for defendant's three prior serious felony convictions incurred pursuant to section 667, subdivision (a).

Defendant also argues that the terms on counts 2 through 10 were computed incorrectly because, for each count, the trial court should have imposed one-third of the middle term for each robbery offense, plus one-third of the enhancement for firearm use. Defendant points to the fact that section 667, subdivision (e)(2)(A)(iii) instructs the court to compute the minimum term of his indeterminate term "pursuant to section 1170." Defendant reasons that this statutory command required the trial court to use "one-third of the applicable term for each offense, plus one-third of the applicable enhancement."

However, section 1170 does not speak to the computation of subordinate terms. Rather, that direction is provided by section 1170.1, which says in relevant part, "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." However, as we have said, section 1170.1 simply does not apply to the computation of the minimum term of the indeterminate term

in this context. (*People v. Nguyen, supra,* 21 Cal.4th at p. 206.)

Nor does section 1170.1 require a reduction of the 30-year-to-life consecutive terms imposed by the trial court on counts 2 through 10, even when the sentence on those counts is viewed in the aggregate. The terms imposed on counts 2 through 10 are all *indeterminate* terms.[10] Section 1170.1 does not apply to consecutive *indeterminate* terms of imprisonment. (*People v. Felix* (2000) 22 Cal.4th 651, 656.)

Defendant cites this court's recent decision in *People v. Riggs* (2001) 86 Cal.App.4th 1126.[11] In *Riggs*, a jury found the defendant guilty of receiving stolen property (§ 496, subd. (a)), and the defendant admitted having one prior strike, a robbery conviction (§ 211). At the time of sentencing, the defendant was serving a 32-month sentence for a separate second degree burglary conviction (§ 459). The trial court imposed an aggregate term embracing both offenses, the two-year prison midterm for receiving stolen property, doubled under the three strikes law (§ 1170.12, subd. (c)(1)), and a consecutive term of 16 months, one-third the two-year prison midterm for the

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[10] Section 667, subdivision (e)(2)(A) provides in pertinent part for "an indeterminate term of life imprisonment."

[11] We refer to our final opinion in *Riggs* after our grant of rehearing, which we issued after defendant in this case filed his supplemental brief.

burglary, computed pursuant to section 1170.1, subdivision (a), and then doubled as a second strike.

We affirmed in *Riggs*. We noted that section 1170.12, subdivision (a)(8) provides: "Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless *otherwise provided by law.*" (Italics added.)[12] We said that section 1170.1 is the law "otherwise provided" to which section 1170.12, subdivision (a)(8), refers. Thus, we concluded the sentencing court must designate principal and subordinate terms as required by section 1170.1, calculating the subordinate terms as one-third of the middle term (except when full-term consecutive sentences are otherwise permitted or required), and then double each of the resulting terms. We concluded the trial court correctly applied section 1170.1 in calculating the defendant's sentence. (*Riggs, supra*, 86 Cal.App.4th at pp. 1128-1132.)

Riggs has no application here. It depended on language contained in section 1170.12, subdivision (a)(8), which, by its terms, applies when a term is imposed "consecutive to any other sentence which the defendant is already serving." Here, defendant was not already serving a sentence when he was sentenced in this case, and neither section 1170.12, subdivision (a)(8), nor its counterpart, section 667, subdivision (c)(8) had any application to defendant's sentencing.

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[12] Identical language is found in section 667, subdivision (c)(8).

The trial court correctly sentenced defendant on counts 2 through 10. Defendant's arguments to the contrary are not meritorious.

V. Defendant's Sentence Does Not Subject Him To Cruel And/Or Unusual Punishment

Defendant claims his sentence of 115 years plus 444 years to life violates the constitutional ban on cruel and/or unusual punishment, under the Eighth Amendment of the United States Constitution[13] and article I, section 17 of the California Constitution.[14] For reasons that follow, we reject defendant's contention.

In *People v. Cartwright* (1995) 39 Cal.App.4th 1123, at pages 1134-1137, we concluded that defendant's sentence, under the Three Strikes Law, of 375 years to life and a determinate term of 53 years, was not cruel and/or unusual under either the federal or state Constitution. That discussion applies fully to this case, and we need not reiterate it here. Suffice it to say that, given the fact that defendant in this case committed 12 armed robberies, that he shot, severely wounded, and permanently

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[13] The Eighth Amendment of the United States Constitution prohibits infliction of "cruel and unusual punishments." This prohibition is applicable to the states by virtue of its incorporation in the due process clause of the Fourteenth Amendment. (See *Robinson v. California* (1962) 370 U.S. 660, 667 [8 L.Ed.2d 758, 763].)

[14] Article I, section 17 of the California Constitution provides in relevant part: "Cruel or unusual punishment may not be inflicted . . . ."

disabled an innocent victim in one of them, and that he had three prior serious felony convictions for robbery, the sentence imposed upon him was neither cruel nor unusual. (*Cartwright, supra,* 39 Cal.App.4th at pp. 1134-1137.)

Defendant relies upon the concurring opinion of Justice Mosk in *People v. Deloza* (1998) 18 Cal.4th 585 at pages 600-601. In *Deloza,* defendant was sentenced to a total of 111 years in prison. In the view of Justice Mosk, "A sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution." (*Ibid.*) Justice Mosk continued, "A grossly excessive sentence can serve no rational legislative purpose, under either a retributive or a utilitarian theory of punishment. It is gratuitously extreme and demeans the government inflicting it as well as the individual on whom it is inflicted. Such a sentence makes no measurable contribution to acceptable goals of punishment." (*Id.* at pp. 601-602.)

We respectfully disagree with Justice Mosk.

Preliminarily, we note that "no opinion has value as a precedent on points as to which there is no agreement of a majority of the court. [Citations.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65; see *People v. Ceballos* (1974) 12 Cal.3d 470, 483.) Because no other justice on our Supreme Court joined

in Justice Mosk's concurring opinion, it has no precedential value.

In any event, we respectfully disagree with Justice Mosk's analysis. In our view, it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution (*People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311) or the federal Constitution. (*Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836] [sentence of life without possibility of parole not cruel and unusual for possession of 672 grams of cocaine].)

Moreover, in our view, a sentence such as the one imposed in this case serves valid penalogical purposes: it unmistakably reflects society's condemnation of defendant's conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future.

We therefore conclude that defendant's sentence does not inflict cruel and/or unusual punishment, under either the state or federal Constitution, even though defendant cannot serve his sentence during his lifetime.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

HULL, J.